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JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-737

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

MAX WARREN COOK v. INDIANA SUPREME COURT

AND

INDIANA SUPREME COURT

DISCIPLINARY COMMISSION

Appellant Appellees

PETITION FOR WRIT OF CERTIORARI

FROM THE SUPREME COURT OF INDIANA

MAX WARREN COOK
312 North West Street
Tipton, Indiana 46072

Tel: 317-675-4601

Appellant pro-Se

July 25, 1989

58 pp

QUESTIONS PRESENTED

(A) Whether Indiana Admissions And Discipline Rule 23 is violative of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States when applied to try, without jury of peers, an attorney (appellant) charged with violations of the Indiana Code of Professional Responsibility, wherein the Indiana Supreme Court appoints the Disciplinary Commission, per D.R.23(6b), to bring and prosecute the action and a Hearing Officer arbitrarily, per D.R. 23(11b), to hear and try the action and the same Indiana Supreme Court is the reviewing tribunal and meter of any sanctions.

(B) Whether the failure of the Executive Secretary of the Indiana Supreme Court to investigate a disciplinary grievance as provided in Indiana Admissions And Discipline Rule 23 (10b, 10c, 10d) prior to the bringing of a complaint against

an attorney (appellant) per Indiana Admissions And Discipline Rule 23(11b, 12a) is violative of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

(C) Whether denial to grant a change of venue from the Hearing Officer arbitrarily appointed by the Indiana Supreme Court pursuant to Indiana Admissions And Discipline Rule 23(11b) upon a showing of just cause therefor is violative of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

(D) Whether denial of a motion to make the complaint against an attorney (appellant) more specific the acts of which he is charged as being in violation of the Indiana Code of Professional Responsibility so he can prepare a proper defense is violative of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

(E) Whether denial of a motion to discover the adversary's documents, etc., witnesses and their anticipated testimony and persons having anything to do with the review and opinion proparation of Indiana Court of Appeals, Second District, Cause 2-1282-A-450, wherein the appellant was found as a fact, without hearing or evidence, to have engaged in vexatious litigation (by bringing the appeal) to harass and maliciously injure another out of which the appellant was charged in a complaint brought by the Indiana Supreme Court Disciplinary Commission, pursuant to Indiana Admissions And Discipline Rule 23(11b), with violation of the Indiana Code of Professional Responsibility, is violative of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

(F) Whether denial to issue subpoenas to persons that engaged in reviewing and making the opinion in Indiana Court of

Appeals, Second District, Cause 2-1282-A-450, wherein the appellant was found as a fact, without hearing or evidence, to have engaged in vexatious litigation (by bringing the appeal) to harass and maliciously injure another out of which the appellant was charged in a complaint brought by the Indiana Supreme Court Disciplinary Commission, pursuant to - Indiana Admissions And Discipline Rule 23(11b), with violation of the Indiana Code of Professional Responsibility, to be witnesses on behalf of the appellant at trial thereof is violative of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

(G) Whether denial to separate counts for trial of violations involving different persons and circumstances and instances of the Indiana Code of Professional Responsibility as charged against the appellant in one amended complaint brought by the Indiana Supreme Court

Disciplinary Commission, pursuant to Indiana Admissions And Discipline Rule 23(11b), is violative of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

(H) Whether denial of appellant's motion filed April 25, 1986 to continue the April 28, 1986 hearing (trial) on account that the appellant was continuing to suffer a severe strep-throat infection that had presisted for over the previous week while under the care and treatment of a physican that interferred with his preparation of his defense and would interfer with his participation in the hearing is violative of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

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JURISDICTIONAL STATEMENT

The appellant Max Warren Cook appeals and petitions for writ of certiorari to the Supreme Court of the United States from the final judgment of the Supreme Court of Indiana dated August 5, 1988 and the denial of a petition for reconsideration (rehearing) on April 26, 1989 that disbarred the appellant from the practice of law in the State of Indiana and holding that Indiana Admissions And Discipline Rule 23, as applied in the case, was not violative of the Due process Clause of the Fourteenth Amendment of the Constitution of the United States. The appellant filed a notice to appeal same to the Supreme Court of the United States with the Supreme Court of Indiana on July 24, 1989.

OPINIONS BELOW

The final judgment opinion of the Supreme Court of Indiana dated August 5, 1988 appears in the appendix hereto, p.2a.

The opinion of the Supreme Court of Indiana dated April 26, 1989 denying appellant's petition for reconsideration (rehearing) appears in the appendix hereto, p.1a.

The Hearing Officer's Findings of Fact, Conclusions of Law And Recommendation dated June 19, 1986 was unpublished and is too voluminous to be reproduced in the appendix and meet the page limitation requirements of Rule 33 of the Supreme Court of the United States.

The opinion of the Indiana Court of Appeals, Second District, dated March 19, 1984 in Cause No. 2-1282-A-450 was unpublished and is too voluminous to be reproduced in the appendix and meet the page limitation requirements of Rule 33 of the Supreme Court of the United States.

JURISDICTION

The Supreme Court of the United States has jurisdiction to consider and grant this petition for writ of certiorari under United States Code Title 28 Section 1257 as amended June 27, 1988.

CONSTITUTIONAL PROVISIONS AND RULES

Fourteenth Amendment, United States Constitution:

> ...no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Indiana Admissions And Discipline Rule 23, 1985.

Same is too voluminous to be reproducted hereat and meet the page limitation requirements of Rule 33 of the Supreme Court of the United States.

Indiana Code of Professional Responsibility, 1985

same is too voluminous to be reproduced hereat and meet the page limitation requirements of Rule 33 of the Supreme Court of the United States.

HOW THE FEDERAL QUESTIONS WERE RAISED

Early in the disciplinary proceedings below the appellant raised the Question presented (A) above in appellant's motion filed September 26, 1985 to set aside the order of the Supreme Court of Indiana appointing the Hearing Officer specifically in paragraph 4 thereof as being a procedure (law) violative of appellant's "rights of due process". Again the same claim was made in appellant's petition filed June 11, 1987 for review of the June 19, 1986 Hearing Officer's Findings of Fact, Conclusions of Law And Recommendations in paragraph I as being a denial of appellant's "constitutional rights of due process" and that such did not provide for a "fair and impartial hearing". This same claim was further raised again in appellant's petition for reconsider-

ation (rehearing) filed September 7, 1988.

The Question Presented (B) above was raised by the appellant in his petition filed June 11, 1987 for review of the June 19, 1986 Hearing Officer's Findings of Fact, Conclusions of Law And Recomendations in paragraph II thereof as having violated appellant's "rights of due process".

The Question Presented (C) above was raised early in the subject disciplinary proceedings by appellant's motion filed January 23, 1986 for change of venue from hearing officer as violative of appellant's "rights of due process and of fair and equal justice". This same claim was again raised in paragraph VI of appellant's petition for review filed June 11, 1987 of the Hearing Officer's June 19, 1986 Findings of Fact, Conclusions of Law And Recommendations as a denial of appellant's "reasonable due process rights" and as "being fair". This was further claimed in appellant's petition for reconsideration (rehearing) filed September 7, 1988.

The Question Presented (D) above was raised early in the subject disciplinary proceedings by appellant's motion filed October 18, 1986 to make the complaint more specific in some eighteen (18) instances without which would "violate respondent's rights of due process as guaranteed unto him by the Constitution of the United States" and deny him the facts of the alleged misconduct in order to be able to defend himself of same. This same claim was also made in appellant's petition filed June 11, 1987 for review of the Hearing Officer's June 19, 1986 Findings Of Fact, Conclusions Of Law And Recommendations.

The Question Presented (E) above was first early presented in appellant's motion for discovery filed October 18, 1985. Again same was raised in appellant's petiton filed June 11, 1987 to review, at paragraph V thereof, the June 19, 1986 Hearing Officer's Findings Of Facts, Conclusions Of Law And Recommendations saying to deny same violates "respondent's rights of due process".

The Question Presented (F) above was raised in the subject disciplinary proceedings verbally at the February 13, 1986 Pre-Hearing Conference and was denied summarily by the Hearing Officer whereupon the appellant informed the Hearing Officer that he considered same as violative of his "rights of due process".

The Question Presented (G) above was raised early in the disciplinary proceedings with the filing on February 7, 1986 of appellant's motion to separate causes for hearing as to deny same would not be "fair procedure" (ie. violvative of the appellant's rights of due process under the Constitution of the United States).

The Question Presented (H) above was raised in on April 25, 1986 with appellant's filing of his motion to continue hearing. To have denied same violated respondent's right of due process under the Fourteenth Amendment of the Constitution of the United States.

STATEMENT OF THE CASE

The appellant, Max Warren Cook, was admitted to practice law in the State of Indiana on May 8, 1966, after graduation in 1965 with a J.D. degree from Georgetown University Law Center, Washington, D.C. and after having successfully passed the Indiana Bar Examination on first trial. The appellant also is a 1948 graduate electrical engineer with B.S. degree from Purdue University. Appellant also did various undergraduate work at St. Lawrence University, Colgate University and University of North Carolina, Chapel Hill during his U.S. Naval Pilot training in World War II.

The appellant was a U.S. Naval Officer and received an honorable discharge in 1945, and thereafter was an honorable member of the U.S. Navy Reserve.

Appellant was employed by Shell Oil Co. in southwestern United States from 1948 to mid-1955 when he became employed by the Exxon Co. in Venezuela until mid-1962.

Appellant attended the University of Michigan Law School and the Georgetown University Law Center, during which time at the latter the appellant was employed by the U.S. Patent Office as a patent examiner and by the Federal Power Commission as a senior staff member and chief inspector of refineries in the United States.

The appellant was solely employed in the private practice of law in Indianapolis, Tipton and Elwood, Indiana from 1966 until he was disbarred by the appealed disciplinary action on August 5, 1988 by the Indiana Supreme Court. During his law practice the appellant handled successfully hundreds, if not thousands, of cases and consultations, including those of many indigents and migrant workers who only spoke Spanish and the appellant has knowledge of that language. The appellant first learned of his dibarrment from reading about same on August 6, 1988 in a newspaper prior to his having been notified of such by the Clerk of the Indiana Supreme Court later.

The appellant has been married to one wife for more than forty years and has three emancipated, college trained sons and one dependant daughter, who is a senior attending the University of Nebraska.

The appellant had open heart by-pass surgery February, 1988. With his said disbarment the appellant has been treated in his community as if he had been found guilty of a crime. He has not been gainfully employed, although having done some uncompensated work, and is now insolvent and without funds with which to employ counsel to represent him in this appeal.

The subject disciplinary proceedings arose out of appellant having represented an innocent indigent who was falsely accused of the crime of extortion as a court-appointed attorney in the Tipton Circuit Court in August, 1979. After an alibi was filed and the prosecutor investigated, the prosecutor had agree to dismiss the criminal charges, but before that was accomplished the false accuser deceased. The crim-

inal charges were subsequently dismissed, however.

The falsely accused indigent, having sufferred incarceration for approximately ten days while endeavoring to raise his small bond money and humilation and defamation in his community, desired sue the prosperous, elderly false accuser for damages for defamation per se. Appellant filed a civil suit for him on August 5, 1980 in the Tipton Circuit Court Cause No. 81-C-216. Trial was had to the regular judge, without jury, and he found against the indigent for lack of sufficient evidence, when there was clear uncontroverted evidence from the secretary of the Tipton Chamber of Commerce that he had been working all morning within her sight of the time of the alleged crime and could not possibly have been engaged in the crime of which he was falsely accused.

The regular judge of the Tipton Circuit Court it was later discovered by the indigent and the appellant as his counsel, that said judge had been a member of the law firm which

had drafted the false accuser's will whose estate had the same bank with whom the judge did business as executor and the former law partner defending the accuser's estate of the indigent's damage suit. The same judge also while a member of the law firm as the defense attorney may have handled business for the accuser prior to his demise. All of these facts were set out in indigent's "affidavit of statement of facts of which judical notice was previously requested for certification by the trial judge" dated October 6, 1982 as part of indigent's appeal of the said trial court decision to the Indiana Court of Appeals, Second District, in Cause 2-1282-A-450 filed October 16, 1982.

The Indiana Supreme Court Disciplinary Commission brought a complaint against the appellant for violation of the Indiana Code of Professional Responsibility in various aspects for having brought what the Indiana Court of Appeals, Second District, found was meritless and for having filed indigent's aforesaid affidavit containing facts that was

found not to have possibily been within the knowledge of the indigent plaintiff, which facts were discovered by both the indigent and the appellant as his counsel, all of which were provable, and which affidavit was made by the indigent client "upon his knowledge and belief". Appellant claimed that what he had discovered on behalf of his indigent client and communicated to said client was properly within said client's knowledge to have been able to properly make said affidavit "upon his knowledge and belief", which contention was not accepted in the subject appealed from disciplinary action.

The trial judge did not comment upon the said affidavit for certification as fact for purposes of the appeal and, therefore, for such appeal should have been deemed true. The Indiana Court of Appeals, Second District, did not comment upon same in their decision but instead arbitrarily, without hearing thereon, found same to have been vexatous litigation to harass and maliciously injure another (the trial judge).

The Hearing Officer and the Indiana Supreme Court on review accepted all of the allegations against the appellant and none of appellant's good cause explanations and evidence.

Count II arose when disgruntled clients desired a refund of their non-refundable initial retainer fee returned while falsely claiming that the appellant had "guaranteed" to find them an adoptable child to their satisfaction within a six month period, after the clients had the birth of a natural child which knowledge they failed to communicate to the appellant until they filed a small claims suit to recover said retainer fee, which suit was found in appellant's favor. Thereafter, these clients used the disciplinary process endeavoring to coerce the appellant into giving them the refund that they had not won in court. The appellant, per testimony in the subject disciplinary proceedings, had diligently expended approximately eighty hours endeavoring to located an adoptable child for said clients. The biased Hearing Officer accepted all of said client's contentions.

Count III of the subject disciplinary action arose when a disgruntaled client seeking a patent application wanted the initial non-refundable retainer fee per written agreement refunded, after he had made several revisions of his concept and electrical design allegedly to reduce noise in reception endeavoring to make same operable with desired noise reduction and had fourteen patent drawings submitted to him for approval on his seventh revision and the appellant requested additional attorney fees and after he had gone to another law firm, whom he had search the concept only to be informed that his concept was unpatentable over the existing art. He falsely filed a grievance claiming that the appellant had not furnished him a rough patent application within two weeks as claimed falsely was the agreement when it was his own fault for any delays by having periodically and variously made several revisions, each of which required starting anew preparing the patent application and drawings therefor. The biased Hearing Officer accepted his contentions and disregared appellant's.

The subject disciplinary action commenced with the Indiana Supreme Court Disciplinary Commission by its Executive Secretary filing a conplaint alleging various violations of the Indiana Code of Professional Responsibility on the part of the appellant with a single count on August 22, 1985 in the Indiana Supreme Court. Thereafter the Indiana Supreme Court on September 4, 1985 appointed by order of the Chief Justice a female jurist from an adjacent county's superior court. Appellant promptly filed on September 26, 1985 a motion to set aside this appointment that was summarily denied October 2, 1985 by the same Chief Justice.

An amended complaint adding two additional counts of misconduct, Counts II and III, was filed November 21, 1985 by the Indiana Supreme Court Disciplinary Commission. The appellant filed a motion to dismiss Counts II and III, which the Hearing Officer denied February 3, 1986.

Appellant filed a motion for change of

venue from the Hearing Officer on January 23, 1986 after it became very apparent to the appellant that the subject Hearing Officer by her actions and conduct was biased and prejudiced against the appellant with a dislike for him. The Hearing Officer summarily denied this motion on February 3, 1986.

The appellant on October 18, 1985 filed a motion for discovery, this also was summarily denied by the Hearing Officer on January 23, 1986. The appellant further filed a motion to make the complaint more specific in several aspects on October 18, 1985, which the Hearing Officer also summarily denied. One January 23, 1986 the appellant filed a motion to dismiss Counts II and III and the Hearing Officer denied same on February 3, 1986.

On February 7, 1986 the appellant filed a motion to separate the counts for hearing purposes and this was also summarily denied by the Hearing Officer. On April 28, 1986 the appellant filed a motion to dismiss paragraph 8 from Count II which improperly charged him

with a crime. This also was summarily denied by the Hearing Officer.

A Pre-Hearing Conference was held February 3, 1986 wherein the final hearing was set to be held April 28, 1986. At this Pre-Hearing Conference the appellant requested that the Hearing Officer issue subpeonas for the judges and law clerks of the Indiana Court of Appeals who had reviewed and made the opinion in Cause NO. 2-1282-A-450 wherein the appellant was found to have engaged in vexatous litigation calculated to harass and maliciously injure another (presumedly the trial judge below), arbitrarily without hearing or evidence thereon, to appear and testify on behalf of the appellant at the final hearing. The Hearing Officer refused this request.

On April 25, 1986 the appellant filed a motion to continue the April 28, 1986 final hearing for reason that the appellant was sufferring an infectous throat illness, which he had had for over a week under the care of a physican, and that same had interferred with

his preparation of his hearing defenses and would interfer with his participation in the final hearing. This the Hearing Officer summarily denied.

The final hearing was held April 28-29, 1986. The hearing was commenced without the appellant present, since he was unavoidably late approximately one hour due to the over-heating of his automobile during the fifty some mile trip from his residence to the place of hearing. The Hearing Officer did not accept this and found the appellant in contempt and fined the appellant the sum of $300.00, after summarily denying appellant's verbal motion for the appointment of another Hearing Officer for the sole purpose to hear the contempt and access any sanctions.

During the course of the final hearing the said Hearing Officer was clearly angry with the appellant, which appellant submits interferred with her judgment. The Hearing Officer was curt, glared at the appellant making him nervious, shook and pointed a

a pencil at the appellant in an offensive manner, rared back in her chair with her legs straightly braced against the legs and bracing of the table before her in a lordly manner, refused to give the appellant no more than five minutes to go a lengthy distance to a restroom on another floor of the Indiana State Office Building (Capitol), refused the appellant permission to fill his water pitcher when the appellant need a drink during the final hearing process to soothe his sore throat and other actions that clearly communicated to the appellant her dislike and anger towards the appellant.

The Hearing Officer filed her Findings of Facts, Conclusions of Law and Recommendations on June 19, 1986. A copy of same was sent to the appellant not until May, 1987 because it had been lost in the Office of the Administrator of the Indiana Supreme Court. A petition for review was filed with the Indiana Supreme Court on June 11, 1987. On August 5, 1988 the Indiana Supreme Court per curiam issued a Disciplinary Action that disbarred the appellant from the practice of law in the State of

Indiana. This was appellant's first offense of a disciplinary action. A petition for reconsideration was filed September 7, 1988 which was denied April 26, 1989 and, thus, this appeal is taken.

THE QUESTIONS ARE SUBSTANTIAL

This petition for writ of certiorari brings before the Supreme Court of the United States the opportunity to lay down the guidelines that could make to disciplinary process a process that is not repugnant to the Fourteenth Amendment of the Constitution of the United States, as is that of the State of Indiana at present time. It will be an opportunity to bring the attorneys out of second class citizenship when they are called upon to defend disciplinary actions that dearly affect them in terms of life and property and income.

As is the present case, the Indiana Supreme Court promulgates all of the Admissions And Discipline Rules and procedures without

any legislative action and without any appointmade to the Disciplinary Commission by the Executive branch of government. This is, the appellant believes, the only instance where the Indiana Supreme Court so imposes its will arbitrarily without the Legislative or Executive branches having an imput into the process. All other commissions and boards of the State of Indiana are established by the Legislature and are filled by the Executive branch, leaving the Indiana Supreme Court, as well as the other courts of Indiana, to be the true, unbiased reviewers of matters decided by such commissions and boards.

The current means of establishing the Indiana Supreme Court Rules of Admissions And Discipline inherently create a bias, or the appearance of a bias, on the part of the Indiana Supreme Court which established such rules and procedures and which appointed members to fill the Disciplinary Commission membership and staff positions, especially the Executive Secretary of the Disciplinary Commission position. The attorney coming before

the Indiana Supreme Court for disciplinary proceedings is behind an eight-ball, so to speak, at the onset. Under the present procedure, decisions can be arbitrarily made without the protection of the individual's rights of due process as envisioned in the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States. All of this can be rectified by the Supreme Court of the United States granting the instant petition for writ of certiorari.

Appellant respectfully submits that the business of courts should not be legislative or executive and that the individuals in our society as lawyers should receive the same legislative and executive input into the disciplinary process and procedure as any other profession does in the State of Indiana.

The Disciplinary Rule 23 complained of in this appeal basically denies due process and is repugnant to the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States. The instant disciplinary

action proceedings was not a fair process as required by the law established in In Re Wireman, 367 N.E.2nd 1368 (Ind. 1977) or in In Re Murrary, 362 N.E.2nd 128 (Ind. 1977) or in In Re Stivers, 292 N.E.2nd 804 (Ind. 1973). Nor did the proceedings and procedure applied meet the test of being a fair tribunal due process requirement as set forth in Holt v. Commonwealth of Virginia, 381 U.S. 131 (1965). Also, same did not meet the test of the fundamental fairness set forth in Watson v. Patterson, 358 F.2nd 297 (CCA 10th. 1966).

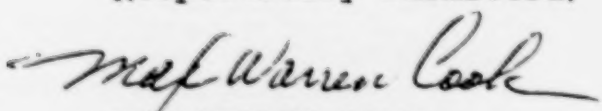
Galvan v. Press, 347 U.S. 522 (1954) established that fair play is the essence of due process. In the instant case, the proceedings and procedure just did not measure up to such standard, nor did the arbitrary and capricious action of the Indiana Supreme Court and of the Hearing Officer meet the requirements set forth in Lopides v. Clark, 176 F.2nd 619 CCA DC 1949).

CONCLUSION

For the foregoing reasons, the appellant

respectfully submits that the Supreme Court of the United States should grant appellant's petition for writ of certiorari here submitted.

Respectfully submitted,



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July 25, 1989

APPENDIX

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IN THE

SUPREME COURT OF INDIANA

IN THE MATTER OF)
) CAUSE NO. 885 S 327
MAX WARREN COOK)

ORDER DENYING PETITION FOR RECONSIDERATION AND ALTERNATIVE PETITION FOR MODIFICATION

Entered April 26, 1989

Comes now Max Warren Cook, Petitioner, and petitions this Court to reconsider its decision and opinion issued on August 5, 1988 in this matter.

And this Court, being duly advised, now finds that said petition should be denied.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Petition for Reconsideration and Alternative Petition for Modification is hereby denied.

DONE at Indianapolis, Indiana, this 26th. day of April, 1989.

/S/ Randell T. Shepard
Chief Justice

Shepard, C.J., DeBruler, Givan, Pivarnik, J.J. concur. Dickson, J., dissents and would grant petition and reduce sanction to a period of one year suspension.

IN THE

SUPREME COURT OF INDIANA

IN THE MATTER OF)
)
MAX WARREN COOK)

CAUSE NO. 885 S 327

DISCIPLINARY ACTION

Per Curiam - Entered August 5, 1988

This Disciplinary Action is now before the Court on a three (3) count amended verified complaint charging the Respondent with conduct in violation of the Code of Professional Responsibility. As provided in Admission and Discipline Rule 23, a Hearing Officer was appointed, conducted a hearing and has tendered findings of fact, conclusions of law, and a recommendation for sanction. The Respondent has petitioned for review of the Hearing Officer's report, and both parties have presented a brief in support of their respective positions.

In his petition for review, the Respondent

challenges various procedural rulings and contends that certain events during the litigation of this disciplinary proceeding constitute the denial of due process. Specifically, he contends that he was denied due process in that the Hearing Officer was not randomly selected from a pool of all attorneys and judges in the state, in that the Executive Secretary signed the complaint for the Disciplinary Commission, in that the Respondent was not contacted before the investigation was conducted, in that a motion to make more specific was denied, in that certain requests for discovery were denied, in that Counts II and III were added, in that the Counts were not segregated for trial, in that criminal charges were alleged without a prior conviction, in that a motion to continue was denied, in that there was an inadequate seperation of witnesses, in that the Hearing Officer allegedly acted impatiently and angrily pointed a pencil toward Respondent, in that the Hearing Officer did not grant the Respond-

ent's request for a change of Hearing Officer, and in that the Hearing Officer's report was not timely served.

It is incumbent for a party seeking review of the Hearing Officer's report to present for this Court's consideration a record, authority, and cogent argument. In re Sekerz (1984) Ind., 458 N.E.2d 229. Respondent's pleadings, at best, minimally meet these requirements. He cites no case law for his constitutional arguments and only makes an occasional obtuse reference to the rules governing attorney disciplinary proceedings. To further diminish the professional character of his petition, Respondent mixes into his argument facts and inferences with incomplete references to any recorded testimony or exhibits.

The question of procedural due process in a disciplinary proceeding has been addressed previously by this Court. In such setting, due process requires notice and an opportunity to be heard in a fundamentally fair proceed-

ing. In re Wireman (1977), 270 Ind. 344, 367 N.E.2d 1368, cert. denied 436 U.S. 904, 98 S.Ct. 2234, 56 L.Ed.2d 402; In re Murray (1977), 266 Ind. 221, 362 N.E.2d 128, appeal dismissed, 434 U.S. 1029, 98 S.Ct. 758, 54 L.Ed.2d 777; In re Stivers (1973), 260 Ind. 120, 292 N.E.2d 904.

Our examination of the proceedings conducted under this cause indicates that the Disciplinary Commission and the Hearing Officer complied with the applicable rules governing disciplinary proceedings. Respondent's minimally adequate petition for review does not offer any case or other authority which might draw into question the validity of these established procedures. This Court, accordingly, finds that Respondent's due process claims, as they may relate to the validity of procedures conducted in accordance with Admission and Discipline Rule 23, are insufficient to warrant review.

With regard to Respondent's general assertions, we further note that criminal

charges need not be brought and tried prior to the citing of parallel allegations in a disciplinary complaint. A disciplinary proceeding stands independent of any analogous criminal conduct. In re Kesler (1979), 272 Ind. 161, 397 N.E.2d 574, cert. denied 449 U.D. 829, 101 S.Ct. 96, 66 L.Ed.2d 34 (1980); In re Crumpacker (1978), 269 Ind. 630, 383 N.E.2d 36; In re Wireman, Supra. Likewise, the alleged denial of due process stemming from a delay in service of the Hearing Officer's report does not present a sufficient claim for relief. This delay did not destroy the fundamental fairness of the entire disciplinary process. In re Wireman, Supra.

In disciplinary proceedings, discovery is not granted as a matter of right. In re Mann (1979), 270 Ind. 358, 385 N.E.2d 1139. The Hearing Officer is afforded discretion with regard to issues relating to discovery. Admission and Discipline Rule 23, Section 14(b). Admission and Discipline Rule 23, Section 13, further provides that the Hearing Officer has

the authority to do all things necessary and proper to carry out assigned responsibilities under this rule; this grant of authority extends to the proper enforcement of orders and directives. Accordingly, we find that the petition for review, as it relates to the alleged abuse of discretion by the Hearing Officer is without merit.

As to the issue of the alleged bias and prejudice of the Hearing Officer, to establish error, the Respondent must demonstrate by competent evidence that the alleged bias and prejudice stems from an extra-judicial source and results in an opinion or stems from some basis other than what was learned through participation in the case. In re Sekerez, Supra., citing United States v. Grinell Corporation, (1966), 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778. Respondent has not met his burden in this regard.

Respondent also asserts in several ways that the Hearing Officer erred in finding the Respondent guilty of contempt. As with other

issues, there is no citation of case authority provided by the Respondent, and, as to this issue, the Disciplinary Commission did not address the legal questions raised. As noted above, Admission and Discipline Rule 23, Section 13 (d) empowers Hearing Officers to do all things necessary and proper to carry out their responsibilities. This includes the power of contempt.

The record not before this Court indicates that on April 28, 1986, the hearing in this case was scheduled to be heard. The Respondent was fully aware of the time, date, and location of the scheduled hearing. On this date, the Respondent failed to appear at the scheduled time. The hearing was delayed one hour and then commenced in the absence of the Respondent. After ten minutes of proceedings, the Respondent appeared and informed the Hearing Officer that he stopped at the Tipton County court house to obtain a certified copy of a docket sheet and that his car had overheated on the way to Indianapolis,

Indiana, where the hearing was scheduled to be heard.

By reason of his conduct in arriving late to the hearing, the Hearing Officer found the Respondent to be in contempt of court. He was fined three hundred dollars ($300.00). We concur in this finding and assessment of fine.

The remaining issues raised by the Respondent relate to the findings of fact tendered by the Hearing Officer. As we have noted in the past, this Court is the ultimate fact finder in disciplinary proceedings. In re Moore (1983), Ind., 453 N.E.2d 971. Our decision is reached through an examination of all matters presented to the court. The Hearing Officer's findings are not binding, but they do receive emphasis in that the Hearing Officer has an opportunity to observe witnesses, absorb the nuances of unspoken communication and by this process, attach credibility. In re Murray, Supra.. Respondent's objections to the tendered findings of

fact have been considered in this Court's determination of the findings.

Under Count I, Respondent is charged with violating Disciplinary Rule 7-102(A)(1) of the Code of Professional Responsibility, by filing a suit, asserting a position, or taking other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another: with violating Disciplinary Rule 7-106 (C)(1) by stating or alluding to matters which he had no reasonable basis to believe would be relevant to the case or would be supported by admissable evidence: with violating Disciplinary Rule 6-101(A)(1) by handling a legal matter which he knew or should have known that he was not competent to handle, without associating with an attorney who was competent to handle the matter; and with violating Disciplinary Rules 1-102(A)(5) and (6) by engaging in conduct prejudicial to the administration of justice which adversely reflects on his fitness to

practice law.

Upon review of the matters filed in this case, we now find that in August, 1979, the Respondent was appointed by the Tipton Circuit Court to represent a defendant charged with theft and extortion. Before the trial commenced, the victim of the alleged crime died and the criminal charges were dismissed by the State. On or about August 5, 1980, Respondent, on behalf of his client, filed a lawsuit against the estate of the victim alleging defamation and malicious prosecution. On May 10, 1982, the Tipton Circuit Court decided this civil lawsuit against Respondent's client.

On July 8, 1982, the Respondent filed a single page Motion to Correct Error which generally asserted"...errors of procedure and of law as shown by the transcription...". On July 9, 1982, the Respondent filed a first supplement to the Motion to Correct Error alleging, for the first time, that the judge of the Tipton Circuit Court should have disqualified himself. In support of his motion,

Respondent, inter alia, cited an alleged "rumor" in the Tipton community of the Judge's "close association" with the attorney who represented the estate in the civil action. On September 17, 1982, Respondent filed a Memorandum in Support of Plaintiff's Motion to Correct Error wherein he draws factual conclusions unsupported by the record and requests judicial notice of such unsupported allegations. The Motion to Correct Error and the first supplement were denied on September 17, 1982. On October 6, 1982, the Respondent prepared and filed an "Affidavit of Statement of Facts of which Judicial Notice Was Previously Requested for Certification by Trial Judge.". Although this affidavit was signed by Respondent's client, it contained certain alleged facts not within the personal knowledge of Respondent's client.

On October 16, 1982, Respondent initiated an appeal of the civil case, and on March 19, 1984, the Court of Appeals affirmed the trial court and found the appeal to be vexatious, devoid of merit and taken in bad faith.

Respondent was assessed costs and attorney's fees. In preparing this attempted appeal, Respondent did not comply with Appellate Rules 2(B), 2(C), 8.3(A), and 12(A).

In light of the above noted findings under Count I, this Court now concludes that, by filing an appeal that was devoid of merit and taken in bad faith, the Respondent violated disciplinary Rule 7-102(A)(1) of the Code of Professional Responsibility in that he filed a suit, asserted a position, and took other action on behalf of his client when he knew or when it was obvious that such action would serve merely to harass or maliciously injure another: by preparing and filing an Affidavit executed by his client when Respondent knew that said Affidavit contained allegations of "fact" not within the personal knowledge of the Affiant, Respondent violated Disciplinary Rule 7-106(C)(1); and by preparing and filing an appeal without complying with Indiana Rules of Appellate Procedure 2(B), 2(C), 8.3(A), and 12(A),

Respondent violated Disciplinary Rule 6-101 (A)(1) in that he handled a legal matter which he knew or should have known that he was not competent to handle, without associating with a lawyer who was competent to handle the matter. Respondent's conduct, in toto, is prejudicial to the administration of justice, adversely reflects on Respondent's fitness to practice law and, accordingly, violates Disciplinary Rules 1-102(A)(5) and (6).

Under Count II, Respondent is charged with violating Disciplinary Rule 7-101(A)(2) of the Code of Professional Responsibility by failing to carry out a contract of employment entered into with a client for professional services and Disciplinary Rules 1-102(A)(3) and (6) of the Code of Professional Responsibility by engaging in conduct involving moral turpitude which conduct adversely reflects on his fitness to practice law.

Upon review of all matters which have been filed, we now find under Count II that on July 19, 1984, the Respondent was retained

to assist in locating and obtaining a child for adoption. Respondent prepared a written fee agreement whereby Respondent received the sum of one thousand five hundred dollars ($1,500) as a "minimum, irrevocable, non-refundable initial retainer fee..." which "...is not payment of any compensation for any services to be rendered or expenses that may be incurred.". In addition, by the terms of the written fee agreement, Respondent was to receive the additional compensation in the amount of twenty-five dollars ($25) per quarter hour or five thousand dollars ($5,000), whichever is greater; with "...one-half (½) of the foregoing minimum retainer fee as a credit towards payment of said compensation...". Respondent further informed his clients that an additional fee of two thousand five hundred dollars ($2,500) would be required to cover the actual adoption, court costs, and medical expenses once a child was located.

Respondent was unable to locate a child to adopt. He did not provide monthly status

reports nor an itemization of expenses, as requested by his clients, and did not return telephone calls to him made by these clients.

On July 9, 1985, these clients sent notice by registered letter to Respondent making demand for the return of the one thousand five hundred dollars ($1,500) retainer fee. Respondent did not respond to the letter: and, on August 9, 1985, his clients filed a civil lawsuit against Respondent in Tipton Circuit Court, Small Claims Division, seeking judgment in the amount of one thousand five hundred dollars ($1,500) plus interest, for legal services not rendered. After a hearing, the Tipton Circuit Court found in favor of Respondent.

In accordance with our findings under this Count, we now conclude that by accepting a minimum, irrevocable, nonrefundable retainer fee of one thousand five hundred dollars ($1,500) and thereafter not providing his clients with requested status reports, an accounting or itemization of expenses, and

not returning his clients' telephone calls, Respondent violated Disciplinary Rule 7-101 (A)(2) of the Code of Professional Responsibility.

In Count III, Respondent is charged with violating Disciplinary Rule 6-101(A)(3) by neglecting a legal matter entrusted to him: with violating Disciplinary Rule 7-101(A)(2) by failing to carry out his contract of professional employment: and with violating Disciplinary Rule 5-103(A) by improperly acquiring a proprietary interest in the cause of action or subject matter of litigation he was conducting for a client.

We now find under this Count that, on September 17, 1983, the Respondent was retained by a client to file a patent application for a noise reduction device invented by the client. Respondent received one thousand five hundred dollars ($1,500) as a fee in the matter, and Respondent promised his client that he would have a "rough write-up" within two (2) weeks. During the period between September, 1983 and January, 1984, Respondent

met with his client and a technical patent draftsman in order to prepare a rough write-up: the write-up was prepared on January 11, 1984.

On February 15, 1984, Respondent informed his client that a final write-up would be prepared in two (2) weeks. Respondent suggested that the client give the Respondent ten percent (10%) interest in the noise reduction device invention because Respondent had made certain suggestions toward improving the operation of the device. Pursuant to Respondent's suggestion, on February 15, 1984, an agreement was entered whereby Respondent was to receive ten percent (10%) interest in his client's invention. Thereafter, Respondent did not keep his client informed of the status of the patent application write-up: and Respondent did not keep at least two (2) scheduled appointments with his client. Only after Respondent was notified that Respondent would be discharged as attorney in the patent

application matter if said write-up was not prepared as promised, did Respondent contact his client on May 16, 1984. Respondent did not prepare the final write-up as promised nor did he ever file a patent application. On October 3, 1984, Respondent was discharged as his counsel for this project.

In accordance with our findings, we now conclude under Count III that by acquiring ten percent (10%) interest in a noise reduction device invention designed by his client, for which Respondent was retained by the client to file a patent application, Respondent did not acquire an impermissible proprietary interest in the cause of action or subject matter of litigation and accordingly did not violate Disciplinary Rule 5-103(A). However, by failing to prepare and deliver certain "write-ups" to his client in a timely manner as promised, failing to keep his client informed regarding the status of the patent application write-ups, and failing to keep scheduled appointments with his client,

Respondent violated Disciplinary Rules 6-101 (A)(3) and 7-101(A)(2) of the Code of Professional Responsibility.

Having determined that the Respondent engaged in the misconduct charged under each of the three (3) counts, it now becomes the duty of this Court to determine an appropriate disciplinary sanction. In this process, this Court considers the nature of the violation, the specific acts of Respondent, the impact on the public, this Court's responsibility to preserve the integrity of the Bar, and the risk, if any, to which we will subject the public by permitting the Respondent to continue in the profession or to be reinstated at a later date. In re Briggs (1987), Ind., 502 N.E.2d 879; In re Stanton (1986), Ind., 492 N.E.2d 1056; In re Duffy (1985), Ind., 482 N.E.2d 1137. The Respondent failed to properly represent his clients, engaged in vexatious litigation, and attempted to profit from a client's labors without performing legal services. It is obvious that Respondent

really does not understand his ethical responsibilities to his clients or his profession. By his acts, Respondent's clients were not provided adequate representation, and the course of conduct demonstrated in toto that it is unlikely that the Respondent can or will be able to provide effective representation. With these considerations in mind, this Court must affirmatively respond to protect the public in the future from further misconduct of this nature.

It is, therefore, Ordered that, by reason of the professional misconduct found in this case, the Respondent be, and hereby is, disbarred as an attorney in the State of Indiana.

It is further Ordered by this Court that the Hearing Officer's contempt order issued during the pendency of this proceeding is adopted and now approved.

Costs of these proceedings are assessed against Respondent.

IN THE

SUPREME COURT OF INDIANA

IN THE MATTER OF)
)
MAX WARREN COOK)

CAUSE NO. 885 S 327

Filed July 24, 1989

NOTICE OF APPEAL

TO THE

SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Max Warren Cook, the above named Respondent, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Indiana entered August 5, 1988 with Respondent's motion for rehearing denied April 26, 1989.

Max Warren Cook

MAX WARREN COOK
Respondent Pro-Se

312 North West Street
Tipton, Indiana 46072

Telephone: 317-675-4601

PROOF OF SERVICE

The undersigned respondent hereby certifies that three (3) exact copies of the foregoing notice of appeal to the Supreme Court of the United States was served each upon the appellee Indiana Supreme Court by the delivery of same to the Clerk of the Indiana Supreme Court and upon the appellee Indiana Supreme Court Disciplinary Commission by the delivery of same to the Executive Secretary of said appellee on July 24, 1989.

Max Warren Cook

MAX WARREN COOK
Respondent Pro-Se